Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of	)
	)
Distribution of Cable Television Royalty Fees	)

BRIEF OF THE JOINT SPORTS CLAIMANTS CONCERNING THEIR ENTITLEMENT TO CABLE TELEVISION ROYALTY FEES

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BRIEF OF THE JOINT SPORTS CLAIMANTS CONCERNING THEIR ENTITLEMENT TO CABLE TELEVISION ROYALTY FEES

Major League Baseball, the National Basketball Association, the National Hockey League and the North American Soccer League ("Joint Sports Claimants"), by their attorneys, submit the following in response to the Copyright Royalty Tribunal's request for a "legal brief or memorandum" on "the objections raised as to the standing of certain or all sports claimants." See 44 Fed. Reg. 59930 (October 17, 1979). The Joint Sports Claimants are filing a separate brief which addresses the other issues raised by the Tribunal's October 17, 1979 notice.

INTRODUCTION AND SUMMARY OF ARGUMENT

No party has ever disputed that broadcasters may, under Section 111 of the Copyright Revision Act of 1976, 17 U.S.C. § 111, claim royalties for the distant CATV retransmission of their nonnetwork news and public

affairs programming. Apparently, however, these royalties are insufficient to satisfy the broadcast industry. The National Association of Broadcasters ("NAB") has, therefore, devised several rather inventive, but totally unjustified, theories in an attempt to appropriate a greater portion of the royalty pool for its broadcast members. As the Tribunal is aware, it is on the basis of these theories that only 40 percent of all commercial television stations licensed within the United States have claimed well over 100 percent of all royalties paid by CATV systems.

From the standpoint of anyone familiar with the legislative history of the Copyright Act or with the well-established patterns of commercial dealings between sports clubs and broadcasters, certainly the most surprising of the NAB's notions is that which seeks to deprive the sports interests of virtually their entire share of the royalty pool. According to the NAB, the broadcaster, and not the sports club, is the copyright owner of the telecasts of that club's games and is therefore entitled to receive the royalties attributable to the CATV retransmission of the club's telecasts into distant markets.

This theory constitutes a rather remarkable reversal of the position which the NAB and other broadcast groups took before Congress during the consideration of the copyright revision legislation. Indeed, when Representative Kastenmeier asked the NAB's General Counsel, Mr. John Summers, to explain who would own the copyright in sports telecasts, Mr. Summers responded without hesitation that "the club, or the league is the copyright holder . . . ."[1/] The NAB's President, Mr. Vincent Wasilewski, indicated in his testimony that, not only were the sports clubs the copyright "proprietors" of sports telecasts, but that a primary interest of the broadcasters was to ensure that CATV systems compensated the sports clubs for the use of this programming. According to Mr. Wasilewski,

> "[T]he broadcasters are not per se in that proposed legislation, asking for payment to them for the use of their signal per se. They are asking for payment to the copyright proprietor for the use of that programming material by the CATV, by the copyright proprietor a motion picture producer, special sports interest, or what have you." 1975 House Hearings at 1377 (emphasis added).

1/ Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 796 (1976) (hereinafter cited as "1975 House Hearings").

There does not appear to be a single instance during the decade-long debate on the copyright legislation where any major broadcast group so much as intimated that the broadcasters, rather than the sports clubs, owned the copyright in sports telecasts. Indeed, this was never even thought to be an issue until the NAB embarked upon its expansionist efforts with respect to the CATV royalty pool.

For several reasons, the NAB's original position -- that the sports clubs are the copyright owners of sports programming -- is absolutely correct.

First, the legislative history of the Copyright Revision Act leaves no doubt that Congress considered the sports clubs to be the copyright owners of their telecasts and the proper claimants of Section 111 royalties. As discussed in detail below, copyright protection for sports programming was afforded at the insistence of the sports clubs, who consistently asserted that they were the copyright owners entitled to control CATV's distribution of their product. The broadcasters never disputed the clubs' status as copyright owners and, in fact, candidly acknowledged the clubs' ownership rights. The broadcast industry's concern with respect to sports programming was to ensure that CATV systems

compensated the sports clubs for the carriage of this programming, thereby establishing fair competition between the broadcasters (who must pay for the sports product) and CATV operators (who were allowed to appropriate this product without payment). In creating copyright protection for sports telecasts, Congress responded to the substantial concerns of the sports leagues that CATV's unconsented and indiscriminate retransmission of these telecasts seriously injured the property rights and economic interests of the sports clubs.

Second, Congress' recognition of the sports clubs as the copyright owners of sports telecasts is strongly supported by well-established common law principles. Over 40 years of judicial decisions have made it clear that the sports clubs have a most valuable property right in the dissemination of the news reports, accounts and descriptions of their games, and that no one may lawfully transmit these reports without the consent of the clubs concerned. As established in National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (S. Ct. 1955), and in the other authority discussed below, the clubs' rights include a property right in any form that these news reports are embodied -- whether it be a radio broadcast, telecast or cablecast.

Third, well-entrenched patterns of commercial dealings between the sports clubs and broadcasters confirm that the clubs are the copyright owners of sports telecasts. As also discussed in detail below, the dealings between the sports clubs and broadcasters are characterized by several fundamental principles which make it quite clear that all of the rights of copyright ownership in sports telecasts are vested in the clubs and not in the broadcasters. It is, in fact, for this reason that broadcasters typically inform the public during each sports telecast that there can be no publication, reproduction or other use of the telecast without the express written consent of the sports club. The sole limited right which the broadcaster possesses is to help create a televised account of a club's games and to "perform" these works over a specific communications medium -- television -- in a defined geographic area. Consistent with the accepted industry custom, the clubs, and not the broadcasters, have assumed all of the responsibilities of copyright ownership -- such as the fixation of their telecasts -- and have exercised the rights of copyright ownership.

Finally, the sports clubs are copyright owners within the meaning of the works made for hire and

transfer of ownership provisions of the Act and are therefore entitled to Section 111 royalties. A copyrightable sports program is the product of the talents and efforts of the broadcasters and sports clubs alike. Nevertheless, as discussed throughout, the broadcasters' function is undertaken in the context of a works made for hire situation and, moreover, all copyright ownership rights are transferred to the sports club; the broadcasters possess but a limited license to televise in a defined market. Under Sections 201(b) and (d) of the Act, the sports clubs are therefore the copyright owners of the sports telecasts.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT MAKES IT PERFECTLY CLEAR THAT THE SPORTS CLUBS ARE THE COPYRIGHT OWNERS OF SPORTS TELECASTS AND THAT THE CLUBS ARE ENTITLED TO THE SECTION 111 ROYALTIES

Congress considered the issues related to cable television and sports programming in the context of copyright legislation during a 12-year period from 1965 to 1976. The statements and conduct of the broadcasters, sports clubs and Congress throughout this entire episode confirm that, in the judgment of all concerned, the sports clubs are the copyright owners of sports

programming and that the clubs are entitled to the Section 111 royalties attributable to this programming.

A. Congress Afforded Copyright Protection to Live Sports Programming At the Insistence of the Sports Leagues

The copyright revision bill, when first introduced in 1965, was ambiguous as to the status of live programming. The bill appeared to provide that the only programming eligible for copyright protection was that which had been "fixed" prior to telecast. Since live sports programming is telecast simultaneously with the live event, prior fixation was precluded.

During the 1965 House and 1966 Senate Hearings on the copyright bill,[2/] the sports leagues urged Congress to afford copyright protection to sports programming in order to protect the clubs from the potentially devastating effects of cable television. For example, Paul Porter, on behalf of Major League Baseball, explained that CATV's unconsented carriage

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2/ Hearings on S. 1006 Before Subcomm. on Patents, Trademarks, and Copyrights of the Sen. Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) (hereinafter cited as "1966 Senate Hearings"); Hearings on H.R. 4347 et al. Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1966) (hereinafter cited as "1965 House Hearings").

of baseball programming posed a substantial threat to the clubs' most valuable assets -- their ability to realize revenues from the sale of television rights and to attract a home gate. Mr. Porter stressed that the clubs must "possess exclusive control" over the broadcasting of their games, and that this "valuable right to control the broadcasting of sports performances may well be destroyed unless the copyright bill is expanded to protect live sports performances from expropriation by CATV."3/

Pete Rozelle, the Commissioner of the National Football League, also underscored the sports clubs' critical need for copyright protection. Testifying before the House Subcommittee in 1965, Commissioner Rozelle emphasized that:

> "We have produced these programs at great expense to ourselves, and total strangers to our league and to its

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3/ 1966 Senate Hearings at 162-63; 1965 House Hearings at 1842-43. In ensuring colloquies with members of the House Subcommittee, the mechanics of copyright protection were discussed with the clear understanding that the clubs would be the copyright owners. Representative Poff, for example, noted that under the draft then being considered, Baseball could achieve copyright protection by telecasting its games via videotape delay or by suing for infringement of retransmitted instant replays. 1965 House Hearings at 1848.

> interests do with them as they will. We must have copyright protections if we are to reestablish our right to sell and to broadcast our programs in accordance with our proper ownership rights.
>
> * * *
>
> "[W]e, as major producers of sports programs, need and want the same protections against unlicensed use of our programs as do the producers of any other type of television entertainment." 1975 House Hearings at 1825-26 (emphasis added).

In short, the sports leagues urged Congress to afford copyright protection to sports programming in order to provide the clubs with control over the distribution of sports telecasts, and thereby to prevent injury to the clubs' property rights and economic interests. As a direct result of the sports leagues' significant efforts,[4/] Congress altered the definition of "fixation" in the copyright revision bill to afford copyright protection to live programming recorded simultaneously with its telecast. And, from 1966 on,

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4/ In the Copyright Office's summary of specific suggestions for amendments used by the House Subcommittee in the 1966 markup, the proposals for copyright protection of live programming are identified as emanating from the professional football and baseball leagues. Register of Copyrights, Copyright Law Revision Hearings -- Summary of Specific Suggestions for Amendments at 1.

there was never any substantial question as to the copyrightability of sports telecasts.

B. The Sports Leagues Consistently Asserted Their Interests As Copyright Owners of Sports Programming and Urged an Exclusion of this Programming from the CATV Compulsory Licensing Provisions in Order To Protect These Interests

The sports leagues returned to Congress to seek what they considered "full copyright protection;" specifically, they urged Congress to exclude sports programming from the compulsory licensing provisions of Section 111.[5/] The testimony which the sports leagues presented again demonstrated that the property interests at stake in the sports-CATV controversy were those of the sports clubs, and not the broadcasters. The

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5/ The sports interests were initially successful in obtaining such an exclusion, which remained in the bill from 1969 through 1974. Ultimately, however, Congress determined not to adopt this proposal:

> "The committee has considered excluding from the scope of the compulsory license granted to cable systems the carriage in certain circumstances of organized professional sporting events. . . . Without prejudice to the arguments advanced in behalf of these proposals, the committee has concluded that these issues should be left to the rule-making process of the Federal Communications Commission or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce." S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975) (emphasis added).

[Footnote continued on following page]

representatives of the leagues testified during the 1973 Senate Hearings[6/] and 1975 House Hearings[7/] as to the impact which CATV would have on the clubs'

[Footnote continued]
In response to this directive, the Federal Communications Commission promulgated a rule requiring CATV systems not to carry certain sports programming. In doing so, the FCC recognized that the clubs are the rights-holders for purposes of limiting the unconsented importation of sports programming. See Report and Order in Docket No. 19417, 54 F.C.C. 2d 265, 283 (1975) ("Deletion of sports programming by affected cable systems will be contingent upon notice being given by the holder of the broadcast rights (i.e., the team, promoter, league, or other agent) of the event to be protected as to what programming is to be deleted").

6/ Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 526-33 (1973) (hereinafter cited as "1973 Senate Hearings") (testimony of James B. Higgins, representing the National Collegiate Athletic Association); id. at 533-36, 539-47 (testimony and statement of Bowie K. Kuhn, Commissioner of Baseball); id. at 547-49 (statement of Don V. Ruck, representing the National Hockey League); id. at 550-51 (statement of Pete Rozelle, Commissioner of the National Football League); id. at 551-52 (statement of J. Walter Kennedy, Commissioner of the National Basketball Association).

7/ Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 785-810 (1976) (hereinafter cited as "1975 House Hearings") (testimony and statement of Bowie K. Kuhn, Commissioner of Baseball); id. at 810-17 (testimony and statement of Philip R. Hochberg, representing the National Hockey League); id. at 817-25 (testimony and statement of John O. Coppedge, representing the National Cable Television Association).

broadcast revenues and home gate attendance.8/ And thus they requested that Congress provide the clubs with the same type of control over their product that other copyright owners possessed.

For example, Bowie K. Kuhn, Commissioner of Baseball, testified that: "I think the question needs to be raised as to why responsible and reasonable people would even consider, under these circumstances, giving cable television a free ride on a property which has been created by professional baseball." 1975 House Hearings at 796 (emphasis added). As Commissioner Kuhn explained, because "we create the property," we would

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8/ The Register of Copyrights thus noted:

> "The sports entrepreneurs that have come forward have differed from time to time. But essentially, they are still trying to preserve exclusivity and gate receipts. It was striking, at one point in a Senate version of the bill, to see all copyright material subject to compulsory licensing, except organized sporting events, which were subject to complete exclusivity. I am not sure this can be defended on policy grounds, although I think the practical problems of sports are undoubtedly real. They are certainly real to them. A compulsory license does not help their gate receipts." 1975 House Hearings at 1827-28 (emphasis added).

like "the kind of reasonable control which we think we, as the copyright holder, should have."9/ The National Basketball Association also went on the record stating that "cable, like over-the-air television, should bargain economically for the right to transmit sporting events and that professional sports should have the right to adequate compensation." 1973 Senate Hearings 553.

Since the interests at stake were those of the sports clubs and since they recognized their status as copyright owners, it is not surprising that the sports leagues sought specific amendments to Section 111 concerning the royalties they expected to receive. Philip R. Hochberg, representing the National Hockey League, thus testified:

9/ 1975 House Hearings at 803, 798 (emphasis added). The National Hockey League similarly observed:

> "It would seem uncommonly logical that the entrepreneurs who have invested millions of dollars to develop the professional sports franchises should, quite reasonably, maintain the right to when and where their product will be telecast." 1973 Senate Hearings at 548.

> "[T]he Royalty Tribunal is empowered under the legislation to change the royalty rate on the revenue basis on which the royalty fee payment by CATV shall be assessed. We sincerely feel that live sports gates and telecasting revenues will be more seriously impaired than other copyrighted efforts. Moreover, this will become a further issue in dealing with distribution of any compulsory licensing fees. Both the Royalty Tribunal and the Copyright Office must be statutorily aware of the unique problems of the organized professional team sports industry as a major component of communications." 1975 House Hearings at 812 (emphasis added).

Furthermore, referring to the language in the Act which permitted claimants to agree among themselves as to the distribution of CATV royalties, Mr. Hochberg stated: "[G]iven the highly unusual nature of sports entities, we urge language specifically allowing organized professional team sports to develop policies relating to the acquisition of all of these fees, their collection, and distribution." 1975 House Hearings at 812.

C. The Broadcasters Themselves Acknowledged That the Sports Clubs Were the Copyright Owners of Sports Telecasts

The representations made by the sports leagues concerning their ownership of sports programming stand

in dramatic contrast to those of the broadcasters. Indeed, not once during the decade-long consideration of the copyright legislation did the broadcasters ever assert any copyright ownership rights in sports telecasts. Nor did they ever dispute the sports leagues' assertion of such rights. Quite to the contrary, the broadcasters actually acknowledged that the sports clubs owned the copyright in sports programming.

For example, in his testimony during the 1975 House Hearings, the General Counsel of the National Association of Broadcasters, Mr. John Summers, testified that the broadcasters were supporting copyright legislation both as copyright owners and as users of copyrighted material. 1975 House Hearings at 777.10/ According to Mr. Summers, sports programming fell within this latter category:

> "MR. KASTENMEIER. One of my questions is who, in fact, is the copyright holder? Who is the creator, author, of this work? In the case of a professional baseball game,

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10/ Mr. Douglas Anello, a former General Counsel of the NAB, similarly testified that: "The interest of broadcasters in copyright is primarily that of a user of copyright material rather than as a creator." 1965 House Hearings at 1720 (emphasis added).

> transmitted over, let us say, a network instantaneously, whether it is ephemerally recorded or not?
>
> "MR. SUMMERS. Well, I guess the club, or the league, is the copyright holder, but the station has purchased the right to broadcast that game, usually at a very large sum of money." 1975 House Hearings at 785 (emphasis added).

Mr. Summers also recognized the special nature of the injury inflicted upon sports by CATV. He referred to professional sports teams as owning a "fragile commodity," and noted, "[u]nlike motion pictures and series, sports are sort of a one-time, instantaneous program." 1975 House Hearings at 785.

The distinction between sports programming (the copyright in which was owned by the sports club) and other types of locally produced live programming (the copyright in which was owned by the broadcaster) was also underscored by another broadcast witness testifying ten years before Mr. Summers. Ernest Jennes, on behalf of the Association of Maximum Service Telecasters, stated:

> "A television station's programming comprises, first, locally created programs owned by the station, for example, local documentaries; second, locally created programs owned by others

> and produced by the station on television under exclusive territorial license, for example, sports telecasts: third, recorded non-network programs as to which the television station has purchased exclusive territorial broadcast rights -- for example, feature film and syndicated programs; and finally, national, regional, and special network programming -- both live and recorded -- as to which the station has geographical exclusivity by contract and network practice." 1965 House Hearings at 1224 (emphasis added).

The President of the National Association of Broadcasters, Mr. Vincent Wasilewski, further suggested that the sports clubs were not only the copyright "proprietors" of sports programming but were, in fact, entitled to receive compensation from the CATV systems for their carriage of sports programming. During the 1975 House Hearings, Mr. Wasilewski stated:

> "[T]he broadcasters are not per se in that proposed legislation, asking for payments to them for the use of their signals per se. They are asking for payment to the copyright proprietor for the use of that programming material by the CATV, by the copyright proprietor a motion picture producer, special sports interest, or what have you." 1975 House Hearings at 1377 (emphasis added).

The NAB's concern, as Mr. Wasilewski saw it, was one of ensuring fair competition between broadcasters (who

were required to pay for sports programming) and cable operators (who were able to expropriate this programming without any payment).

D. Throughout the Debates on the Sports-CATV Issue, Congress Exhibited a Concern with the Copyright Interests of the Sports Clubs

Throughout the debates on the sports-CATV issue, Congress exhibited a concern with the property rights of the sports clubs, and virtually ignored the broadcasters on this issue.11/ For example, the Senate Committees explained than initial decision to exclude sports programming for compulsory licensing on the ground that the unrestricted CATV transmission of sports telecasts would seriously injure the economic interests of the affected sports clubs:

> "Unrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmission

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11/ In fact, the NAB noted during the 1973 Senate Hearings that the broadcasters were not even invited to participate in the hearings on copyright treatment of sports events. 1973 Senate Hearings at 380.

> of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games."12/

12/ Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., "Draft Report to Accompany S. 543" at 29 (1969) (emphasis added). Essentially the same language was included in S. Rep. No. 93-1035, 93d Cong., 2d Sess. 67 (1974).

This was by no means the first time that Congress had recognized the clubs' property rights in their telecasts. As early as 1953 Congress observed:

> "The baseball clubs take elaborate precaution to protect their property rights in the games and in the play by play description of them . . . .
>
> ". . . [Unauthorized baseball broadcasts are] a free ride on the efforts and expenditures of the licensed broadcaster as well as an unauthorized appropriation of the valuable rights of the club in the play-by-play script and unrehearsed sports drama which its team has originated.
>
> ". . . The clubs employ extensive capital expense, and labor in exhibiting the games and are entitled to protection against misappropriation by others of the fruits of the clubs' efforts. Your committee understands that these property rights are supported by well-established principles of law, including principles of common law copyright and the principles of equitable protection against unfair competition." S. Rep. No. 387, 83d Cong., 1st Sess. 11 (1953).

Senator Hugh Scott thus framed the question in terms of how to accommodate the competing interests of CATV and sports -- not CATV and local television stations. He stated: "The issue is not protection of television contracts but rather an attempt to ensure the financial health of sports teams. . . ." S. Rep. No. 93-983, 93d Cong., 2d Sess. 220 (1974) (additional views of Senator Hugh Scott) (emphasis added).[13/] During the floor debate on the copyright bill, Senator Scott similarly spoke of the goal of "balanc[ing] the competing but legitimate rights of sports and cable television." 120 Cong. Rec. 16070 (1974) (remarks of Senator Scott) (emphasis added). Again, no reference was made to broadcasters. During those same floor debates, even an opponent of strict controls over CATV retransmission of sports telecasts conceded that the sports clubs are the copyright owners:

> "The owners of professional sports teams have made a concerted effort to be given special treatment beyond that provided to other owners of copyrighted material." 120 Cong. Rec. at 16158 (remarks of Senator Hruska).

13/ Senator Scott also pointed to the harm to sports home attendance and the value of sports broadcasting rights caused by CATV. S. Rep. No. 93-983 at 219-20.

Other Congressmen also recognized the ownership interests of sports.14/

In short, there was never any controversy over the ownership of sports programming. The sports leagues repeatedly asserted that the clubs were the owners, and that there were substantial economic reasons to afford their clubs complete copyright protection. Congress recognized that copyright protection for this

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14/ For example, when Commissioner Kuhn described the procedure by which CATV receives permission to carry distant signals of baseball telecasts, Representative Railsback asked: "When the FCC does that, is there any opportunity for the local station to appear and resist? Also, is there a chance for the copyright holder to also complain or file a grievance as well --?" 1975 House Hearings at 804-05 (emphasis added). Clearly, and quite properly, Representative Railsback conceived of the local station and the copyright holder as two separate parties. At another point in the hearings, Representative Pattison asked Commissioner Kuhn "so it would be to the interest of most clubs to have their signals imported if they were getting a copyright on it all over the country, wherever they were not playing?" Id. at 807 (emphasis added).

Senator Tunney also noted that under full copyright protection for sports programming, a CATV system could not import this programming "unless [it] could get special permission -- at additional cost -- from the sports team." S. Rep. No. 93-1035, 93d Cong., 2d Sess. 77 (1974) (Minority Views of Senator Tunney). Accord, 120 Cong. Rec. 16071 (1974) (remarks of Senator Gurney) (under proposed bill, CATV system "would have been prevented from carrying sports events at any time, without first obtaining special permission from the sports teams involved").

programming was necessary, and that the interests at stake were those of the sports clubs. And the broadcasters candidly admitted that the sports clubs were the owners. Only now that the NAB has sought to inflate the broadcasters' share of the royalty pool has any issue been created.

II. FIRMLY ENTRENCHED COMMON LAW PRINCIPLES STRONGLY SUPPORT CONGRESS' RECOGNITION OF THE SPORTS CLUBS AS THE COPYRIGHT OWNERS OF SPORTS TELECASTS

Over 40 years of judicial decisions have made it clear that no one has any right to broadcast a sports event without the consent of the clubs involved in that event. The clubs, "by reason of [their] creation of the game," have a "property right" in the "news" of the game and the "right to control the use thereof." Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938). They have, therefore, the "sole right of, disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions or accounts of [such] games . . . ." Id. at 493-94 (emphasis added).15/ In this sense, a

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15/ The courts have repeatedly recognized these property rights. See, e.g., Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 487 (3d Cir.), cert. denied, 351 U.S. 926 (1956) (boxing); National Exhibition Co. v. Fass, 143 N.Y.S.2d 767, 768, 770, 777 (S. Ct.

[Footnote continued on following page]

sports event is wholly unlike a typical news event which a television station is free to broadcast.

In order to promote their games and to obtain added revenues, sports clubs have licensed certain broadcasters to disseminate the "news reports, descriptions, or accounts" of the clubs' games. The courts, however, have made two points absolutely clear with respect to these licensing arrangements. First, the licensee has only the limited and narrow right to disseminate over the communications medium and in the geographic area specifically identified in the licensing agreement.16/ Second, the club has a property right in any work created pursuant to this license. Both

[Footnote continued]
1955) (baseball); Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459, 7 N.Y.S.2d 845, 850-52 (1938) (hockey). See also Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977), where the Supreme Court acknowledged these property rights, concluding that no one may, without the consent of the "promoters or participants," "film and broadcast a prize fight . . . or a baseball game. . . ."

16/ Because the "economic value" of the game which the clubs have created at great expense and effort lies in the "'right of exclusive control over the publicity given to [these games],'" Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977), the courts have construed this right most narrowly. See, e.g., Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956)
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of these points are well-illustrated in National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (S. Ct. 1955).

The defendant in that case listened to the play-by-play telecasts of the New York Giants' baseball games over radio station WMCA (New York, New York) and television station WPIX (New York, New York). Without the consent of the Giants, he simultaneously teletyped reports of the Giants games to radio stations across the country for immediate rebroadcast. As should be apparent, the defendant functioned in much the same manner as a cable system operator does today.

The court in National Exhibition Co. enjoined the defendant's unauthorized use of the WMCA and WPIX broadcasts of the New York Giants' games as a violation of the Giants' property rights. It also awarded the Giants the profits which the defendant had realized as a result of his unlawful activities. In reaching

[Footnote continued]
(grant of motion picture rights to a prize fight did not include the right to use this motion picture on television); Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459 (1938) (license to take pictures of professional hockey team for use in newsreels did not include the right to use these pictures in a feature film). See also Manners v. Morosco, 252 U.S. 317 (1922) (licensee to "produce, perform and represent" a play did not include right to make a motion picture of that play).

these results, the court reaffirmed the principle that the sports club has a valuable property right in the "oral and/or pictorial descriptions" of its games, and that the club could authorize the transmission of

> "such descriptions for broadcast over such, but only such, radio or television station or such radio or television stations located in such geographical area or areas as may be agreed upon between [the station and the club] . . . ." 143 N.Y.S.2d at 777 (emphasis added).

It concluded that the defendant's unauthorized use of the broadcasts had deprived the club of the "just benefits of its labors and expenditures in respect of the creation and production of baseball games and public dissemination of descriptions and accounts thereof . . . ." 143 N.Y.S.2d at 777. Finally, it held that the defendant's action, unless enjoined, would "depreciate and destroy the value and marketability of [the club's] property and render it impossible for [the club] to realize in full the benefits of its rights . . . ." 143 N.Y.S.2d at 777.

In short, a long line of judicial authority strongly supports Congress' recognition of the sports clubs as the copyright owners of sports telecasts. As established in the National Exhibition Co. case and

other cases cited above, a sports club possesses a property right in the "news reports, accounts, and descriptions" of its games and in any form that these reports are embodied -- whether it be a radio broadcast, telecast or cablecast. A licensee's sole right is to disseminate these news reports over the medium and in the geographic area specifically designated.

III. WELL-ESTABLISHED PATTERNS OF COMMERCIAL DEALINGS BETWEEN THE SPORTS CLUBS AND BROADCASTERS CONFIRM THAT THE CLUBS ARE THE COPYRIGHT OWNERS OF SPORTS TELECASTS AND THAT THE CLUBS ARE ENTITLED TO THE SECTION 111 ROYALTIES

The clubs have entered into a variety of licensing arrangements with respect to the nonnetwork telecasting of their games.[17/] While the precise terms of these arrangements vary, there are several fundamental principles which are common to all and which confirm

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17/ Some clubs have licensed broadcast rights directly to local television stations for a rights fee, while others have formed joint ventures whereby the club and broadcaster share the revenues derived from the telecasts. A very few of the clubs have licensed their rights to sponsors who, in turn, deal with the stations. In many cases, teams are responsible for the entire production of the telecast, with the station providing only the airtime. For example, the Pittsburgh Penguins were "responsible for the entire production of the game and all costs required in providing a continuous signal to the station . . . ." This is also true of the Los Angeles Dodgers, Houston Astros, Cincinnati Reds, Seattle Mariners, Los Angeles Lakers, Kansas City Kings, New York Knickerbockers, New York Rangers, Los Angeles Kings, Philadelphia Flyers and other teams. In the case of the North American Soccer League, virtually every team is responsible for the production of its telecasts.

that the sports clubs, not the broadcasters, are the copyright owners of the telecasts of the clubs' games.

First, the broadcasters are granted the right to broadcast certain games over conventional television only. For example, in its contract with the California Angels baseball team, Station KTLA-TV (Los Angeles, California) explicitly recognizes that the Angels "are licensing the so-called free television rights only" and that the Angels "reserve and retain all other rights." Likewise, the contract between the Minnesota North Stars hockey club and Twin City Federal Savings and Loan Association grants only "the right to televise, through local television stations . . . ."

Second, the broadcaster has no rights with respect to any other communications medium, such as cable television. For example, the Boston Red Sox baseball club reserves "all rights to any use of broadcasts of the games by any cable television (CATV) system." The contract between the Chicago Cubs baseball team and Station WGN-TV (Chicago, Illinois) states that the rights licensed do not include the right "to authorize any Community Antenna Television system to carry the broadcasts." The contract between the Chicago White Sox baseball club and Station WSNS-TV (Chicago,

Illinois) similarly provides that WSNS has no right "to authorize any Community Antenna Television (CATV) system to carry the broadcasts, such rights being reserved to the Club." Likewise the contracts of the Los Angeles Kings hockey club and Washington Bullets basketball club vest all CATV rights outside the station's 35-mile specified zone in the clubs.

Third, the broadcasters possess conventional television rights in a limited geographic area only.[18/]

18/ Congress advanced two reasons for its decision requiring CATV systems to pay royalties for the retransmission of distant non-network programs. The first is that the retransmission of this programming "directly benefits" the cable system "by enhancing its ability to attact subscribers and increase revenues." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976). The second is that such retransmission

> "causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market." H.R. Rep. No. 94-1476 at 90 (emphasis added).

As discussed above, the right to exploit sports telecasts in these distant markets belongs solely to the clubs, and not the broadcasters, who are generally licensed to do no more than televise in their local areas. The CATV retransmission of sports telecasts thus impinges upon the marketing rights of the sports clubs and not the broadcasters. Consistent with the underlying purpose of the compulsory licensing royalty scheme, the sports clubs are the proper recipients of the Section 111 royalties.

For example, the Cleveland Indians baseball club has granted Storer Broadcasting Company

> "the right to broadcast by television (telecast) from and by any commercial television broadcast station licensed by the Federal Communications Commission to serve the City of Cleveland, Ohio, and whose transmitter is located within the home territory of the Indians [i.e., within 50 miles from the Cleveland stadium]."

The Pittsburgh Penguins hockey team has also authorized station WPGH-TV (Pittsburgh, Pennsylvania) to broadcast only in the "home territory" of the team. Similarly, the San Francisco Giants baseball club has granted Miami Valley Broadcasting Co. the right "to televise within the exclusive area on Free Television . . . ." "Exclusive area" is defined in the contract to encompass a territory only slightly larger than the San Francisco Bay area.

Fourth, while broadcasters may videotape and use for limited purposes the highlights of the telecasts, they are generally prohibited from recording any telecast in its entirety and rebroadcasting, republishing or otherwise disseminating the telecast. A typical provision is that in the contract between the Detroit Tigers baseball club and WWJ-TV (Detroit, Michigan),

which provides that WWJ "shall not rebroadcast, re-enact, dramatize or use or copy in any manner the broadcasts made pursuant to the rights granted to it hereunder without the consent of the Baseball Club." Similarly, the Chicago Cubs have authorized WGN-TV to record "selected portions" of the Cubs' telecasts; these recordings, however, may be used only for the "limited purpose" of broadcasting over WGN "as part of news, sports news, sports documentaries and sports special programs.19/

Fifth, the sports clubs have retained the rights to authorize any copying or reuse of the telecasts of their games and have insisted that the broadcasters so inform the viewers of the sports telecasts. Again, a typical provision is that found in the contract between the New York Yankees and Station WPIX-TV, which requires WPIX to announce at least once during each telecast of a Yankees game that:

19/ As the Tribunal is aware, a live program is not copyrightable unless it is "fixed in a tangible medium of expression" -- for example, videotaped. See 17 U.S.C. § 102; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976). A broadcaster which has no right to fix a telecast certainly has no right to claim any CATV royalties attributable to these telecasts. See H.R. Rep. No. 94-1476 at 56 (copyright does not subsist in "unauthorized fixations of live performances or telecasts").

> "This program is authorized under television rights granted by the New York Yankees solely for the entertainment of our audience and any publication, reproduction or other use of the pictures, descriptions or accounts of this game without the express consent of the Yankees is prohibited." (Emphasis added.)

Sixth, the clubs have demanded certain high standards of quality with respect to the telecasts of their games. The licensing agreements will describe the types of equipment which the broadcasters must use, such as instant replay and slow motion disc; specify the numbers of cameras that must be available for the telecasts; and require the broadcaster to maintain the equipment "in good condition so as to facilitate the broadcast of each game." They also impose upon broadcasters the duties to use "professionally qualified personnel" and to ensure that the telecasts promote the best interests of the club and league. Furthermore, the clubs possess certain rights of approval with respect to the play-by-play announcers and, in certain cases, actually employ these announcers.

Seventh, the sports clubs have undertaken all of the responsibilities and exercised the rights of copyright owners. They have, for example, initiated

elaborate procedures to ensure that each of their telecasts is properly fixed (videotaped) and therefore copyrighted.[20] Significantly, these videotapes have been used by the clubs for the production of syndicated sports highlights programs, such as the Major League Baseball Promotion Corporation's production of "This Week in Baseball." In addition, the sports leagues have, without any previous objection from the broadcasters, consistently asserted the interests of their clubs as copyright owners in proceedings before the Tribunal, Copyright Office and other agencies, as well in dealings with other parties. Furthermore, at the insistence of the clubs, several broadcasters have actually announced and visually represented to the public during the sports telecasts that the clubs are the copyright owners of these telecasts.

Finally, there appears to be only one television station which has ever specifically identified itself as a copyright owner in its licensing agreement -- and this station has authorized the club to exercise the

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20/ See, e.g., the notice of the Tribunal published at 43 Fed. Reg. 40,225 (Sept. 11, 1978), where the Tribunal specifically approved Major League Baseball's fixation procedures.

rights to Section 111 royalties.[21] By contrast, several broadcasters specifically acknowledged in the licensing agreements which cover the 1978 television rights that the clubs are the copyright owners of the telecasts.[22] Other broadcasters have made the same acknowledgement in agreements covering post-1978 television rights.[23]

21/ WTCG (now WTBS) (Atlanta, Georgia) had a contract with the Atlanta Hawks basketball team which provided that WTCG was the copyright owner of the sports telecasts. Nevertheless, WTCG stated in its July 1979 filing with the Tribunal that the Hawks would be the Section 111 claimant for 1978. See Claim No. 207.

22/ For example, paragraph 13 of the licensing agreement between the New York Yankees and Station WPIX-TV (New York, New York) provides that the Yankees shall "continue to own all property rights in the telecasts . . . ." The contract between the Pittsburgh Penguins hockey team and Station WPGH-TV (Pittsburgh, Pennsylvania) provides that:

> "[F]or purposes of Federal copyright law, the Club shall be regarded as the rights holder in the live telecasting of any of the games by the Station, with all rights flowing therefrom."

The contract which the Portland Trailblazers basketball team has with Station KPTV (Portland, Oregon) requires the station to "preserve the copyright of [the club] . . . in the telecast of each game . . . ."

23/ For example, paragraph 3.7 of the 1979-82 contract between the Chicago Cubs baseball team and WGN-TV (Chicago, Illinois) provides in part that:

> "The Club is the owner of the copyright in each telecast or radio broadcast made pursuant to this agreement and possesses all rights afforded a copyright owned by the Copyright Revision Act of 1976, Pub. L. No. 94-553 (the "Act"). These rights include, but are not limited to, with respect to rebroadcast of such telecasts and radio broadcasts, the rights to receive royalties distributed pursuant to section 111 of the Act and the right to sue for infringement under Chapter 5 thereof."

The essence of copyright ownership is, of course, the ability to exercise each of those exclusive rights which comprise a copyright. Under Section 106 of the Act a copyright owner has the exclusive rights to "reproduce the copyrighted work"; to "prepare derivative works based upon the copyright work"; to "distribute copies" of the copyrighted work; to "perform the copyrighted work publicly"; and to "display the copyrighted work publicly." As discussed above, these rights of ownership are vested in and have been exercised by the clubs, and not the broadcasters; the only right which the broadcaster possesses is to "perform" the work over a specific communications medium -- television -- in a defined geographic area. The dealings between the clubs and broadcasters are thus squarely inconsistent with any notion that the broadcaster is a copyright owner.

In short, like the admissions made by the NAB and other broadcasters during the hearings on the copyright legislation, the commercial arrangements between the sports clubs and broadcasters leave no question as to the understanding of these parties with respect to copyright ownership prior to the NAB's attempt

to expand the broadcast industry's share of the CATV royalty pool.

IV. THE SPORTS CLUBS ARE THE SOLE COPYRIGHT OWNERS WITHIN THE MEANING OF THE WORKS MADE FOR HIRE AND TRANSFER OF OWNERSHIP PROVISIONS OF THE ACT

Under Section 111(d)(4) of the Copyright Revision Act the Tribunal is authorized to distribute CATV royalties only to "copyright owners":

> "The royalty fees thus deposited shall . . . be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period. . . ." 17 U.S.C. § 111(d)(4) (emphasis added).

The "copyright owner" may be either the owner of the full copyright in the work or, if the right to claim Section 111 royalties has been vested in a particular party, the owner of that particular right.24/

24/ Referring to Section 201(d)(2) of the Copyright Act, the House Report states that the Act "contains the first explicit statutory recognition of the principle of divisibility of copyright in our law." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 123 (1976). This provision means that "any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately." Id. The definitional section of the Act, Section 101, specifically states that: "'Copyright owner,' with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right."

Under Section 201(a) of the Act copyright ownership "vests initially in the author or authors of the work." Although broadcasters, through their cameramen and directors, perform an "authorship" function in connection with sports telecasts, it should be obvious that no one would switch on his television set to view several cameramen and a director working at an empty stadium. Fans do not watch sports telecasts to see aesthetically pleasing camera shots, but to see, as the court noted in National Exhibition Co. v. Fass, 143 N.Y.S.2d 767, 770 (S. Ct. 1954), the "original and unique performances of highly skilled performers" and "as the game unfolds, a drama consisting of the sequence of plays."25/ The cameramen, directors, announcers,

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25/ The court stated:

> "The plays appearing in the baseball games of plaintiff's team and the sequence of those plays constitute original and unique performances of highly skilled performers which are of great interest to the public and have commercial value to plaintiff as the creator and exhibitor of the games and as licensor of rights to prepare and to radio broadcast and telecast descriptions and pictures of its games. In creating the games, the competing clubs not only create an exhibition for the spectators at the game but also create, as the game unfolds, a drama consisting of the sequence of plays, which is valuable program material for radio and television stations and for which licensees have paid and are paying plaintiff substantial sums." 143 N.Y.S.2d at 770 (emphasis added).

[Footnote continued on following page]

players and others associated with the production of any athletic event must necesarily blend their respective talents to create this telecast of a unique and special type of programming. And, therefore, the copyrightable work is the product of the "authorship" efforts of the clubs and the broadcasters alike.26/

[Footnote continued]
Congress has likewise noted that the "plays which make up baseball games and the sequence of those plays constitute original and unique performances which are of great interest to the public and of commercial value to the clubs as the creators and exhibitors of the games and as licensors of rights to broadcast and telecast descriptions and reproductions of the games." S. Rep. No. 387, 83d Cong., 1st Sess. 11 (1953).

26/ Compare H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976):

> "The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable."

Nevertheless, as the discussion in the preceding sections illustrates, the broadcaster's authorship function is undertaken pursuant to a licensing arrangement with the sports club. In order to promote its team and to obtain additional revenues, the sports club has commissioned the broadcaster to present over conventional television in a limited geographic area telecasts of a carefully selected number of the club's games. The broadcaster receives an exclusive license to telecast in this area, which in turn provides him with a valuable promotional tool for his station and significant advertising revenues. However, all ownership rights remain in the club.

Under these circumstances, the broadcaster (with the assistance of the club) has clearly created a "work made for hire," within the meaning of Section 101 of the Act.[27/] The broadcaster has, moreover, transferred any ownership rights which it might have to the club.

27/ Section 101 provides that a "work made for hire" is a "work specially order[ed] or commissioned for use . . . as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Sections 201(b)[28] and (d)[29] of the Copyright Act make it clear that the club is thus the sole "copyright owner" of the telecasts, and that it is the proper recipient of the Section 111 royalties attributable to these telecasts.

This result is, of course, mandated by the plain intent of Congress in creating copyright protection for sports programming as well as by well-settled common law principles. Moreover, there is nothing in the

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28/ Section 201(b) provides that: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

29/ Section 201(d)(1) provides in part that the "ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . ." Section 201(d)(2) provides:

> "Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title."

legislative history of the Copyright Act which is inconsistent with this result.

The NAB has placed great reliance upon a passage in the legislative history which considers the role played by broadcasters in creating a sports telecast. See NAB Suggested Broadcaster's Justification 17-20 (July 1979).30/ This passage, however, suggests no more than that cameramen and directors have an authorship function in connection with sports telecasts. It first appeared in the House Report accompanying the 1966 copyright revision bill as part of a discussion of the copyrightability of sports telecasts. See H.R. Rep. No. 2237, 89th Cong., 2d Sess. 44-55 (1966). The

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30/ "The bill seeks to resolve, through the definition of 'fixation' in section 101, the status of live broadcasts, sports, news coverage, live performances of music, etc. that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'" H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976).

language now appears in the 1976 House Report's analysis of Section 102 of the Act, entitled "General Subject Matter of Copyright," and not in the analysis of Section 201, entitled "Ownership of Copyright," or Section 111. Thus, the sole purpose of this passage is to demonstrate that live sports programming is copyrightable -- and not to establish any particular party's ownership rights in sports telecasts or entitlement to Section 111 royalties. As discussed above, the legislative history of the Act, common law development, the commercial arrangements between the broadcasters and sports clubs and the language of the Act itself establish that the clubs are the copyright owners.

CONCLUSION

For the reasons stated above, the Joint Sports Claimants submit that their member clubs are the copyright owners of their telecasts and, therefore, are entitled to receive any Section 111 CATV royalties attributable to CATV's retransmission of these telecasts into distant markets.

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